

Newspaper Editor Criminally Liable for Senator's Op-Ed, But Prison Sentence Violated Article 10: *Belpietro v. Italy*

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Nine years ago, in its landmark [Cumpănă and Mazăre v. Romania](#) judgment, a unanimous Grand Chamber laid down a rare absolute rule that prison sentences for defamation are never justified under Article 10 where the defamatory statements concern a matter of public interest. This rule against prison sentences included pardoned, suspended, or conditional sentences, effectively removing from European legislatures and courts the ability to impose such sentences. Last week, the Second Section of the Court correctly applied *Cumpănă and Mazăre*, holding in [Belpietro v. Italy](#) that a suspended four-month prison sentence given to a newspaper editor for criminal defamation violated Article 10. Somewhat more controversially, however, the Court also held that in principle, imposing criminal liability on a newspaper editor for publishing a defamatory article written by an Italian senator raised no issue under Article 10.

The applicant in *Belpietro v. Italy* was the editor of the national daily newspaper *Il Giornale*, which had published an article by the Italian senator Raffaele Iannuzzi, entitled ‘*Mafia, tredici anni di scontri tra P.M. e carabinieri*’ (Mafia, 13 years of clashes between the public prosecutors and police). It was a lengthy piece analysing the lack of results in combating the mafia in Palermo. In particular, the senator criticised the Italian judiciary and some members of the public prosecutors’ office in Palermo of being negligent in the exercise of their functions, or using political strategies in their fight against the mafia.

Two prosecutors, Lo Forte and Caselli, considered some of the allegations in the senator’s article as tarnishing their reputation. They lodged a criminal complaint for defamation against the senator, and against the newspaper’s editor, Maurizio Belpietro. Regarding the liability of *Il Giornale*’s editor, the prosecutors relied on article 57 of the criminal code, making the director of a newspaper responsible for lack of control when publishing defamatory statements without sufficient factual basis. Separate proceedings were brought against the senator, which ended in 2007 with a finding that there was no case to answer, on the grounds that the senator had expressed his views in his capacity as a member of the senate, being shielded by parliamentary immunity under article 68(1) of the Italian constitution. The Italian senate accepted that the statements published were related to the exercise of his parliamentary functions.

The newspaper editor was acquitted the same year by the City Court of Milan, emphasising the right of a politician to express his personal opinions in public on such an important issue as the fight against the mafia in Italy. From this perspective, the City Court recognised the right of the press to publish an elaborated, sharp and personal opinion by a politician, although some of the statements in the senator’s article might have been inaccurate. However, in 2009 the editor was sentenced on appeal to a suspended four-month prison term, and ordered to pay substantial sums to each of the civil parties, totalling 110,000 euro. The Milan Court of Appeal considered some of the allegations against members of the judiciary as very serious, without a sufficient factual basis and hence being defamatory of the two prosecutors.

The editor made an application to the European Court of Human Rights, alleging that his conviction for defamation had violated his freedom of expression under Article 10. After

reiterating extensively the general principles of its relevant case law on the issue, including the balance that has to be found between the prosecutors' reputation rights under Article 8 and the newspaper editor's right to freedom of expression under Article 10, the Court found that the Italian authorities had not breached Article 10 in finding the editor liable for publishing the senator's article, which had tarnished the prosecutors' reputation. Although the article concerned an issue of importance for society, which the public had the right to be informed about, some of the allegations against the prosecutors were very serious, without sufficient objective basis.

Furthermore, the Court supported the approach expressed in article 57 of the Italian criminal code imposing on a newspaper editor the obligation to control what is published, in order to prevent breaches of the law and to prevent the publication of defamatory articles in particular. This duty did not disappear when it concerned an article written by a member of parliament, as otherwise, according to the Court, it would amount to an absolute freedom of the press to publish any statement of parliamentarians in the exercise of their parliamentary mandate, regardless of its defamatory or insulting character. The Court also referred to the fact that the senator had been convicted in the past for defaming public officials, and the newspaper had given a prominent place to the senator's article, accompanied by a picture and subtitles, contributing to the allegations resulting in an attack on the professional reputation of the members of the judiciary. It followed, according to the Court, that holding the editor liable for having published the defamatory article met the conditions of Article 10: it was prescribed by law, aimed at protecting reputation, and was necessary in a democratic society.

However, as the Court considered the sanction of imprisonment and the high award of damages as disproportionate to the aim pursued, it came to the conclusion that solely for that reason the interference by the Italian authorities amounted to a breach of Article 10. The Court drew particular attention to the fact that a sentence of imprisonment (even if suspended) can have a significant chilling effect, and that the conviction was essentially for not having executed sufficient control before publishing a defamatory article. Therefore there were no exceptional circumstances justifying such a severe sanction. A unanimous Second Section concluded that Italy had violated Article 10, awarding the editor 15,000 euro in damages and costs.

Comment

The Second Section is to be lauded for holding the sanctions imposed on the editor violated Article 10. The Italian criminal code still provides for a possible prison sentence of three years for criminal defamation, and as detailed by the free speech organisation [Article 19](#), numerous Italian journalists have been jailed for defamation, even as recently as May 2013 (see [here](#), [here](#), and [here](#)). The lawfulness of these jailings is highly questionable under the rule laid down nine years ago in *Cumpănă and Mazăre*, and correctly applied in *Belpietro*. It is hoped Italy will now get rid of prison sentences as a punishment for defamation, abiding by a [call](#) from the U.N. Human Rights Committee to do so in 2006, and a similar [call](#) in 2007 from the Council of Europe Parliamentary Assembly for all European states to abolish prison sentences for defamation without delay.

However, while the holding on the sanctions point is welcome and correct, the secondary holding that it was consistent with Article 10 to, in principle, convict the editor for criminal defamation is questionable. First, the Court held the case involved a conflict of rights between Article 8 and Article 10, and consequently the standard of review was light, with the

Court needing “strong reasons” to substitute its view for those of the Milan Court of Appeal, and only asking itself whether the Court of Appeal’s decision was “arbitrary or clearly erroneous,” citing [MGN v. UK](#), [Palomo Sánchez a.o. v. Spain](#) and [Von Hannover no. 2 v. Germany](#). However, none of these cases concern defamation of public officials, and the Court fails to apply, or even mention, the recent Grand Chamber case which actually deals with reputation under Article 8, namely [Axel Springer v. Germany](#), laying down a clear rule for deciding whether Article 8 is triggered in a case involving reputation: ‘an attack on a person’s reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life.’ It is arguable that Article 8 was not triggered in *Belpietro*, as the senator’s article dealt exclusively with the professional duties of public officials, and was opinion-based.

Second, the standard of review should have been more exacting, as the Court arguably should have applied two seminal Grand Chamber judgments which deal with defamation, namely [Bladet Tromsø v. Norway](#), where the ‘most careful scrutiny’ standard was applied, and [Nilsen and Johnsen v. Norway](#) where ‘strict scrutiny’ was applied. Moreover, under [Castells v. Spain](#), the ‘closest scrutiny’ must be applied to interferences with elected representatives’ freedom of expression, which includes recourse to a degree exaggeration or provocation ([Ormanni v. Italy](#)).

The third criticism relates to the fact that the Second Section had no difficulty accepting that a criminal prosecution of a newspaper editor initiated on behalf of two public officials raised no question under Article 10. The Court nowhere applied the principle from the unanimous [Raichinov v. Bulgaria](#) opinion, that criminal proceedings for defamation are only proportionate in ‘certain grave cases,’ such as for hate speech or incitement. Moreover, nowhere does the Court apply the [Kuliś v. Poland](#) opinion, that due to the dominant position those in power occupy, they should display restraint in resorting to criminal proceedings for defamation, especially where other means are available. The two public officials in *Belpietro* were well-known public prosecutors, with access to many means to respond, including press releases, using the right of reply under Italian law, or civil defamation proceedings. The Court in *Belpietro* arguably only paid lip-service to the principle that public officials are subject to wider levels of criticism.

Fourth, and perhaps the most difficult point, relates to the holding neither Article 10, nor parliamentary immunity, absolves newspaper editors of criminal liability under Italian law for failing to ensure their newspapers do not print defamatory articles written by parliamentarians. The Court had a number of options: it could have focused on the *criminal* liability aspect of the Italian law, and held that while parliamentary immunity should not extend to newspaper articles, holding editors subject to *criminal* conviction would violate Article 10 (while subjecting editors to *civil* liability would be consistent with Article 10). Instead it chose to allow the Italian law pass Article 10 scrutiny. The consequence is an indirect reduction of the impact of the parliamentary privilege which the Court itself in earlier cases considered as a principle constituting ‘a long-standing practice designed to ensure freedom of expression among representatives of the people and to prevent the possibility of politically-motivated prosecutions, interfering with the performance of parliamentary duties’ ([A. v. UK](#)). While it is defensible that parliamentary immunity can only be strictly related to the opinions and statements made by MPs in relation to their parliamentary mandate ([Cordova v. Italy \(No. 1\)](#), [C.G.I.L. and Cofferati v. Italy](#), [C.G.I.L. and Cofferati no. 2 v. Italy](#), and [Onorato v. Italy](#)) it is more difficult to understand why the media informing the public about these (protected) opinions and statements can be held criminally liable.